

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

MAY 14 2009

CLERK, U.S. DISTRICT COURT  
RICHMOND, VA

EDWARD LEE BIRCHETT,

Petitioner,

v.

Civil Action No. 3:08CV749

SUSSEX COUNTY CIRCUIT COURT,

Respondent.

MEMORANDUM OPINION

Edward Lee Birchett, a Virginia prisoner, has submitted this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions in the Circuit Court for the County of Sussex for two counts of distribution of cocaine. Respondent has moved to dismiss on the grounds that Birchett has not exhausted his state court remedies.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Furthermore, "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure the question presented." 28 U.S.C. § 2254(c). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997)

(citing Spencer v. Murray, 18 F.3d 237, 239 (4th Cir. 1994)).

Here, Birchett has not presented any of his claims for relief to the Supreme Court of Virginia. Moreover, Birchett may still may present his claims to the Supreme Court of Virginia by filing a petition for a writ of habeas corpus. See Va. Code Ann. § 8.01-654. Thus, Birchett has not exhausted his state court remedies. Accordingly, Respondent's motion to dismiss (Docket No. 12) will be GRANTED. The action will be DISMISSED WITHOUT PREJUDICE to Birchett refiling after he has exhausted his state court remedies.

The Clerk is directed to send a copy of the Memorandum Opinion to Birchett and counsel of record.

And it is so ORDERED.

/s/

*REP*

Robert E. Payne  
Senior United States District Judge

Date: May 14, 2009  
Richmond, Virginia